

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

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|------------------------------|---|-----------------------|
| DELBERT McNEIL, JR., |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| v. |) | Case No. CIV-07-89-HE |
| |) | |
| BRUCE HOWARD, Warden, JEHCC, |) | |
| <i>et al.</i> , |) | |
| |) | |
| Respondents. |) | |

Report and Recommendation

Respondent Bruce Howard filed a motion to dismiss, and the Petitioner filed a document entitled “Motion to Withdraw 28 USC § 2254 Without Prejudice.” In his motion, the Petitioner requested dismissal without prejudice. Through the Court Clerk’s office, the Respondents state that they do not object, and the Court should grant Petitioner’s request.

The Petitioner’s right to voluntary dismissal is governed by Fed. R. Civ. P. 41(a)(1). *See* Fed. R. Civ. P. 81(a)(2); Rule 11, Rules Governing Section 2254 Cases in the United States District Courts; *see also Williams v. Clarke*, 82 F.3d 270, 273 (8th Cir. 1996) (holding that the habeas petitioner’s voluntary dismissal under Fed. R. Civ. P. 41(a)(1) was “both appropriate and consistent with the rules governing habeas corpus cases”).


Mr. McNeil has an absolute right to dismiss the action without prejudice because the Respondents have not filed an answer or motion for summary judgment. *See* Fed. R. Civ. P. 41(a)(1). As a result, the Court should treat Petitioner’s “motion to withdraw” as a motion

for voluntary dismissal and grant the motion, dismissing the action without prejudice to refiling. *See Janssen v. Harris*, 321 F.3d 998, 999-1001 (10th Cir. 2003).

Any party may file written objections with the Clerk of the United States District Court. 28 U.S.C. § 636(b)(1). The deadline for objections is April 17, 2007. *See* W.D. Okla. LCR 72.1(a). Failure to file timely objections will generally result in waiver of the right to challenge the recommended disposition on appeal. *See Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991); *see also Marshall v. Chater*, 75 F.3d 1421, 1426 (10th Cir. 1996) (“Issues raised for the first time in objections to the magistrate judge’s recommendation are deemed waived.”).

This report and recommendation terminates the referral.

Entered this 28th day of March, 2007.



Robert E. Bacharach
United States Magistrate Judge